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Recent Case Notes (and Indiana Docket)

RECENT CASE NOTES

AUTOMOBILES—CONSTITUTIONAL LAW—COMMERCE.—Action by the city of South Bend against Sprout. Judgment for the plaintiff and the defendant appeals. An ordinance of the City of South Bend, authorized under Burns' Ann. St. 1926, § 10284, cls. 32, 38, required the owner of every motor driven commercial vehicle operated within the city, to obtain an indemnity bond conditioned to pay for injuries, and a license from the city before it could do business as a carrier of passengers within its limits. The appellant operated a bus between South Bend and Niles, Mich., and had not complied with the ordinance. He received only passengers who would pay fare to a point in another state and contends that the ordinance is void because it undertakes to regulate and impose burdens upon interstate commerce in violation of the third clause of section 8, article 1, of the Constitution of the U. S. Held: Although the appellant was exclusively engaged in interstate commerce, the use of the city streets as a place for the solicitation and acceptance of passengers brought him within the police power of the state to license and regulate both driver and vehicle by way of providing for the safety and general welfare of the public, so long, at least, as Congress has not legislated on the subject. *Sprout v. City of South Bend*, 153 N. E. 504. Petition for rehearing overruled, 154 N. E. 369.

So far as the regulation of interstate commerce is concerned the doctrine of the U. S. Supreme Court now is that the states do not have a concurrent power with the federal government, at least, where the interstate commerce concerns a matter national in scope, but that they do have the right to exercise some police power. The requirement of an indemnity bond would seem to be a proper exercise of such power. *Coolen v. Board of Wardens of Philadelphia*, 12 How. 299; *Leisy v. Hardin*, 135 U. S. 100; *Southern Ry. Co. v. King*, 217 U. S. 524. The Court in the principal case does not discuss the constitutionality of the license fee levied by the City of South Bend. The federal constitution gives Congress the power to regulate interstate commerce. Art. I, § 8-3. No state has the right to lay a tax on interstate commerce in any form. *Lying v. Mich.*, 135 U. S. 161; *Leisy v. Hardin*, 135 U. S. 100. Except so far as it is necessary to carry into effect its police power. *Smith v. St. Louis and S. W. Ry. Co.*, 181 U. S. 248; *Patapsco Guano Co. v. N. Car. Board of Agriculture*, 171 U. S. 345; *Bowman v. Chi. and N. W. Ry. Co.*, 125 U. S. 465. Although the Supreme Court of U. S. has held that a state can not require a license fee as a condition precedent to the right of an interstate carrier to do business within its limits, *Interstate Busses Corp. v. Holyoke St. Ry. Co., et al.*, 47 Sup. Ct. Rep. 298; *Buck v. Kuykendall*, 267 U. S. 307; *Bush Co. v. Maloy*, 267 U. S. 317; *DeSanta v. Commonwealth of Pa.*, 47 Sup. Ct. Rep. 267; *Ticklen v. Shelby County Taxing District*, 145 U. S. 1; nor other conditions precedent; *International Text Book Co. v. Pigg*, 217 U. S. 91; *Sioux Remedy Co. v. Cope*, 235 U. S. 202, yet it has also declared that the amount of a license fee imposed by a state upon interstate carriers may be properly based not only on the cost of inspection and regulation under its police power, but also on the cost of maintaining improved roads. *Huse v. Glover*, 119 U. S. 543; *Hendricks v. Maryland*, 235 U. S. 610; *Kane v. N. J.*, 243 U. S. 160; *Martine v. Kozen*, 11 F. (2nd) 645; 21 Ill. L. Rev. 559. Perhaps a state should be allowed to make a reasonable charge for furnishing facili-

ties for the use of those engaged in interstate commerce. But can the principle that a state cannot impose any conditions precedent to the right to do interstate business stand together with the proposition that the state has the right to prohibit to an interstate carrier by motor vehicle the use of its street until a license is obtained from the state?

R. E. M.

CRIMINAL LAW—ORAL INSTRUCTIONS TO JURY.—Appellant was charged with unlawfully buying, concealing, and aiding in the concealment of, certain diamonds alleged to have been stolen, having full knowledge that said diamonds were stolen property. At the conclusion of the evidence and before the argument had begun, the appellant tendered to the Court sixteen instructions in writing, together with a written request signed by the counsel for the defendant that the Court should "instruct the jury in writing, and give to the jury the following instructions, and each of them," and of the instructions so requested the Court gave all but one, after which he gave further instructions orally. Appellant was found guilty, fined and sentenced. Overruling his motion for a new trial is assigned as error, under which appellant complains because the trial court gave oral instructions to the jury of more than 1,500 words, taken down by the reporter in shorthand, and constituting nine instructions, in the course of which the indictment and statutes were read, grand and petit larceny explained, and general statements of the law were given. Question arising is whether or not the oral instructions constitute a reversible error. Held: Reversible error, in absence of showing of waiver. *Lindey v. State, Supreme Court of Indiana,* Oct. 26, 1926, 153 N. E. 772.

Burns' Ann. St. 1926, § 2301, subd. 5, reads as follows: "The Court must then charge the jury, which charge, upon the request of the prosecuting attorney, the defendant or his counsel, made at any time before the commencement of the argument, shall be in writing and the instructions therein contained numbered and signed by the court."

Where the Court is required, pursuant to the statute, to instruct the jury in writing, it is fatal error to read from the printed statutes; but the matter should be copied into a written instruction and read from the copy: *Smurr v. State,* 88 Ind. 504; *Stephenson v. State,* 110 Ind. 358; *Littell v. State,* 133 Ind. 577. Requirement of written instructions at request of either party is mandatory and is not complied with by directing the official stenographer to transcribe the oral charge. *Brindle v. State,* 88 S. E. 460. The act of the court reporter in taking down the oral instructions does not convert them into written instructions as required by statute. *Lesener v. State,* 136 Ind. 448. The statutory right to have the jury instructed may be waived even in a criminal case. *Bird v. State,* 210 p. 925. However, in the case at bar, the defendant at the time of the giving of the oral instructions separately and severally excepted to them. This sufficiently shows that the defendant excepted to the actions of the Court in giving the oral instructions and did not waive the request for written instructions.

In *Lindley v. State* (Nov. 3, 1926), 153 N. E. 890, which followed the principal case, the appellant was charged with violation of the liquor law; tried by jury and at the proper time presented to the trial court a written request that the Court should instruct the jury in writing and give certain written instructions. The Court gave all the written instructions but one and then proceeded to give another series of instructions orally to which

the appellant reserved an exception. Court held this to be a reversible error. These two cases, being decided at practically the same time, are good law and the decisions are backed by the weight of authority.

R. W. M.

NEGLIGENCE—EVIDENCE—APPEAL—ERROR.—Appellee recovered in the lower court in an action for damages for personal injuries, alleged by appellee to have been caused by her falling in an aisle of the Lyric Theater in Indianapolis, Indiana, operated by the appellant. Complaint charged that the seats in the rear of the theater were placed on a floor level several inches higher than the aisle, that the aisle was insufficiently lighted, with no warning of danger, that appellee left her seat in the rear of the theater, fell over the step-off into the aisle and broke her left arm at the wrist, that the ushers had gone home and the lights were turned out for a vaudeville performance, that appellee had never been in that part of the theater before and did not know of the step-off, that appellant owned and operated several theaters in Indianapolis and kept cashiers at the doors for the purpose of collecting the admission. Appellant entered a general denial. A jury awarded appellee damages of $750. Appellant's motion for a new trial was overruled and appellant brings error, contending that the verdict of the jury is not sustained by sufficient evidence. *Held:* Judgment affirmed. *Central Amusement Co. v. Van Nostran,* Indiana Appellate Court, June 2, 1926, 152 N. E. 183.

Appellant's first contention is that the verdict of the jury is not sustained by sufficient evidence. In an action for personal injuries alleged to have been caused by defendant's negligence, plaintiff must prove by a fair preponderance of the evidence, defendant's negligence and his own injury, but need not prove freedom from contributory negligence. *Indiana Union Traction Co. v. Reynolds,* 176 Ind. 263. What is or is not negligence is a question for the jury. *City of Greencastle v. Martin,* 74 Ind. 449, 39 Am. Rep. 93. Appellant next contends that there is no evidence that appellee was in appellant's theater by invitation, that she had paid admission, or that she was other than a licensee. Here there was no direct evidence that appellee had paid but there was evidence that appellant had a cashier at the entrance, whose purpose it was to sell admissions, and where there is no evidence to the contrary, very slight evidence is sufficient to sustain a fact. *Ferger et al. v. Interprovincial Flour Mills,* 80 Ind. App. 248, 140 N. E. 450. *Moody et al. v. State ex rel. Burton,* 84 Ind. 433; *Louisville, New Albany and Chicago Ry. Co. v. Goodbar,* 88 Ind. 213. Appellant next contended that it was reversible error for the court to permit evidence of other persons falling from the same step-off before the time of the accident here involved. Evidence of other persons previously falling over the same step-off was not reversible error. To show that a defect in property existed and caused a particular injury, evidence of other accidents or injuries occurring about the same time or place, from same or similar cause is admissible. *Cleveland, C., C. and I. Ry. Co. v. Newell,* 104 Ind. 264, 3 N. E. 836; *Louisville, N. A. and C. Ry. v. Lang,* 13 Ind. App. 337, 41 N. E. 609; *Medsker v. Pogue,* 1 Ind. App. 197, 27 N. E. 432; Wigmore on Evidence, Sec. 458; *Darling v. Westmoreland,* 52 N. H. 401, 13 Am. Rep. 55. It is not the universal rule, however, that in showing the dangerous quality of a thing, testimony as to its effect at other times may be given. The whole question is one that must rest in the sound discretion of the court. There is a danger in admitting the evidence, in that

it opens the door to such a wide field of collateral inquiry. McKelvey on Evidence, Sec. 114.

A. E. B.

WILLS—CONSTRUCTION.—The testatrix made a residuary devise to her brother and sister in equal shares. Devise provided that should the brother die before the testatrix, the whole of the property should go to the sister, but no mention of the possibility that the sister should predecease testatrix. The sister died before testatrix, and the brother claims the whole of the property under the residuary clause. There are no other heirs except collateral heirs whom testatrix specifically excluded from the estate. The collateral heirs now claim the lapsed devise by intestacy. Judgment for the brother below. *Held:* Residuary devise vested in the brother. *Hedges et al v. Payne et al.* Appellate Court of Indiana, Dec. 9, 1926, 154 N. E. 293.

The collateral heirs claim under the general rule: "Where the residuary gift is to several persons as to one of whom the gift lapses or is void, his share goes to the testator's heirs on next of kin and does not increase the shares of the other residuary beneficiaries." 40 *Cyc.* 1952. But this rule is predicated on the common law distinction between a lapsed bequest of personal property and a lapsed devise of real estate, the former going to the residuary legatee, the latter to the heir, 4 *Kent Com.* 541; *Greene v. Dennis,* 6 Conn. 293. But the reason for this distinction, that the will would operate on all the personalty at death, but that the testator could only devise such realty as he owned at the time of making the will, *Holbrook et al v. McCleary et al.,* 79 Ind. 161, is abrogated by Sec. 3502, Burns' 1926, which provides, "Every devise in terms denoting the testator's intention to devise his entire interest in all his real or personal property shall be construed to pass all of the estate in such property, . . . which, he was entitled to devise at his death. . . ." Thus lapsed devises or legacies go into the residuary portion of the estate and pass to the residuary devisees or legatees. *Holbrook v. McCleary,* 79 Ind. 167.

The intention of the testator, as shown by the language of his will must govern in construing his will. *Corey v. Springer,* 138 Ind. 506. And partial intestacy is to be avoided in the construction of wills unless the language of the will compels it. *Myers v. Carney,* 171 Ind. 379, 384. Here the testator clearly intended to devise all his property, and the provision of equal shares was put in only to show how the testator wished the two residuary devisees to take, should they both survive. *Gray v. Bailey,* 42 Ind. 349. The case is clearly right, in view of the above authority and rules, and the abrogation by statute of the common law distinction between estates of personalty and realty devised by will. B. B. C.

INDIANA DOCKET

SUPREME COURT

24979. THE ALLIED MAGNET WIRE CORP. v. TUTTLE. Marion County. *Petition for rehearing denied.* Martin, J. April 19, 1927.

A corporation may not be dissolved at the request of the shareholders and a receiver appointed merely because dividends that are indicated as payable at a certain time are not in fact paid. The petition for rehearing in this case was overruled. But a dissenting opinion was filed holding that the petition for a re-hearing should have been granted since there was an express contract in keeping with the statute according to which the preferred stockholders could dissolve the corporation where the preferred dividends were not paid. (Burns' 1926, sec. 4837.)

25117 BOLDEN v. STATE. Marion County. *Reversed.* Gemmill, C. J. April 6, 1917.

It is reversible error for the prosecution in a criminal case to introduce evidence of the defendant's character unless and until the defendant himself has introduced evidence of his good character.

25269 GROSE v. STATE. Marion County. *Affirmed.* Gemmill, C. J. April 27, 1927.

Where there is sufficient evidence to support the judgment of the lower court, the court on appeal will not reverse the judgment because of conflicting evidence.

25255 LOWERY v. STATE. Monroe County. *Affirmed.* Gemmill, C. J. April 22, 1927.

Where appellant, who was transporting a package, tried to conceal it and that package in fact contained intoxicating liquor, the jury was warranted in inferring that he knew he was doing an unlawful act.

24415 MALES v. STATE. Madison County. *Reversed.* Travis, J. April 30, 1927.

An instruction that it must appear to the "reasonable satisfaction of the jury" that the defendant acted in self defense is erroneous in a prosecution for second degree murder. If the jury entertains reasonable doubt of defendant's guilt in acting in self defense, then the jury should acquit the defendant.

25235 RHODES v. STATE. Knox County. *Reversed.* Myers, J. April 27, 1927.

Where defendant is not adequately advised of his rights or of the laws of the state concerning the punishment for the crime with which he is charged, it is error for the court to permit him to plead guilty and to impose sentence of death on this plea.

25215 SPEYRBOECK v. STATE, St. Joseph County. *Affirmed.* Martin, J. April 6, 1927.

An officer may not search a soft drink parlor for intoxicating liquor where he does not see a violation of the law unless he first reads a search warrant. (Burns' 1926, sec. 2158.) Where there is a general verdict given on the complaint containing two counts and one of these counts is bad while the other is good, the judgment on the one will be sustained.

25353 STATE v. BOWMAN, State Auditor. Marion County. *Reversed.* Travis, J. April 19, 1927.

The legislature may constitutionally increase the salaries of its own members to cover the then present term for which they were elected. This is held not to involve retroactive legislation or to violate the constitution in any way. Dissenting opinion by Willoughby, J. and concurring opinion by Martin, J. in same case.

25169 UNION TRACTION CO. OF INDIANA v. HINGER, ADMR. ETC. Hendricks County. *Reversed.* Myers, J. April 7, 1927.

Where a person has been guilty of contributory negligence he can only recover if the negligence of the defendant is the proximate cause of the injury which operated in such a way that his own negligence did not contribute to the injury.

APPELLATE COURT.

12697 ABSHIRE v. SMITH ET AL. Kosciusko County. *Reversed.* Remy, J. April 28, 1927.

Where a contract is made whereby one party is to buy gasoline at the market price from the other party who has made a loan conditioned on this purchase, then there may be issued an injunction forbidding this party from buying his gasoline from anyone else. This equitable relief to enforce the contract is given on the ground that the loan was made without security in reliance upon the contracted purchase and damages for breach of contract are indefinite and inadequate since the party has the benefit of the loan and will continue to refuse to purchase the gasoline unless the injunction is issued.

12944 ATZ v. CITY OF INDIANAPOLIS, ET AL. Marion County. *Reversed.* McMahan, C. J. April 21, 1927.

Under the amendment of 1919 to the statute covering the assessment of taxes for improvements of streets in cities of the first class (Burns' 1926, sec. 10445), it is required that the cities assess the property on intersecting streets in accordance with the statute and not merely property on the street that is improved.

12615 BASSETT, ET AL v. SOUTH. Howard County. *Affirmed.* McMahan, C. J. Nichols, J. concurs in results. April 28, 1927.

Where the total estate of the deceased husband is not worth more than $500, his real property will go to the widow as part of her minimum alotment of the $500 even though she was a third and childless wife while children by previous marriages survived.

12674 BRASSAND v. STONER. Newton County. *Affirmed.* McMahan, C. J. April 1, 1927.

Where a provision is made for a surviving husband in a will he will be held to take under the will and not under the law unless he expressly elects to take by law. And if the will indicates an intention to make a gift to the husband, this will amount to a gift even though merely predecatory words are used.

12588 BULLERDICK, ET AL. V. MILLER, ET AL. Clay County. *Appeal Dismissed.* Nichols, J. April 8, 1927.

Where a case has already been reversed, and a new trial ordered, there is no occasion for a new appeal asking a new trial on the ground of newly discovered evidence.

12885 CHRISTMAN, ADMR. V. HACK. Martin County. *Affirmed.* Remy, J. April 20, 1927.

Under Burns' 1926, sec. 554, a claimant against a decedent's estate may testify as to service performed before the death of the decedent which involve his claim, in the discretion of the court. Where a *prima facie* case has already been made, it is not an abuse of this discretion for the court to admit such evidence.

12682 CLARK V. FAST, ET AL. Huntington County. *Affirmed. Per Curiam.* April 8, 1927.

Per Curiam.

12710 COMMONWEALTH CASUALTY CO. V. KINCAID. Howard County. *Affirmed.* April 21, 1927.

An error in admitting testimony is not ground for reversal where the error could not have injured the appellant's case.

12794 CREECH V. HUBBARD. Clay County. *Reversed.* Thompson, J. April 20, 1927.

Where there was no evidence from which the jury could reasonably find its verdict, the trial court should give judgment for the other party *non abstante veredicto.*

12990 IN RE DEARMINE V. DEARMINE. Daviess County. *Affirmed.* Nichols, J. April 29, 1927.

Where lots in a municipality have adequate egress and ingress, then the lot owners have only a general public interest and are not entitled to special damages where certain streets are closed by the municipal authorities.

12678 DIDDEL, ET AL V. AMERICAN SECURITY CO, ET AL. Montgomery County. *Affirmed.* Nichols, J. April 22, 1927.

Where there is an agreement for the vendor to take back an automobile unless it has been in a collision, this means a collision which injured the automobile and a purely technical collision will not relieve the vendor of his liability.

12892 DITZLER POULTRY CO V. FORSYTHE, ET AL. Industrial Board. *Reversed.* April 29, 1927.

Where an employee is killed while driving his own car home from work after the details of his employment for the day were completed, it cannot be said that the death occurred in the course of the employment.

12638 DIXIE-PORTLAND FLOUR CO. V. KELSAY-BURNS MILLING CO. Warrick County. *Affirmed.* Nichols, J. April 29, 1927.

Where a contract contains a "dispensation clause" providing that the party shall not be liable for continued performance in case of fire, strikes, acts of God, etc., this clause will relieve the party of liability to supply flour where he is a miller and his mill has burned.

12239 FAIR BUILDING CO., ET AL. v. WINEMAN REALTY CO., ET AL. Marion County. *Affirmed.* McMahan, C. J. April 26, 1927.

Where a grant of land is made and a covenant to pay for part of a party wall if it should be used at a later time is made incidental to this grant, then this covenant to pay for the wall so used will run with the land against the assignees of both parties to the grant.

12636 THE FIDELITY & CASUALTY CO., ET AL. v. SINCLAIR REFINING CO. Porter County. *Affirmed.* Nichols, J. April 22, 1927.

Where one contractor gives a bond to cover the performance of its undertakings and a sub-contractor likewise gives a bond for the performance of its undertakings, the party who contracted with the principal contractor cannot be subrogated to claim on the bond where the sub-contractor defaults, where there is no privity of contract.

12654 GENERAL HIGHWAYS SYSTEM, INC. v. THOMPSON, ET AL. Vanderburgh County. *Petition for rehearing denied.* Nichols, J. April 29, 1927.

Where under a mortgage the mortgagor is required to deposit the proceeds of half of the goods sold to the account of the mortgaged debt, he is left free to apply the other half of such proceeds as he thinks best.

12644 HEROD v. METZGER. Marion County. *Affirmed.* Remy, J. April 5, 1927.

Affirmed on authority of *Groves v. Hobbs* (1903) 32 Ind. App. 532, 70 N. E. 279.

12690 HOBBS v. LUDLOW, ET AL. Rush County. *Affirmed.* Nichols, J. April 8, 1927.

A claimant on a promissory note has ten years in which to bring his action after the payment is due under the Indiana law and this right to sue within ten years cannot be barred unless the case is expressly brought within the exception which holds that if the cause of action is in fact barred under the law of another state, it will not be recognized in Indiana. (Burns' 1926, sec. 306.)

12515 HOOSIER FINANCE COMPANY v. CAMPBELL, ET AL. Gibson County. *Affirmed.* April 7, 1927.

Where a mortgagor is entitled to take possession of property in case it is levied on by creditors of the mortgagor, this possession is such that a valid lien may be filed against the property on the ground that it is in the legal possession of the mortgagor.

12827 INDIANAPOLIS PUMP AND TIRE CO. v. SURFACE. Industrial Board. *Reversed.* McMahan, C. J. April 5, 1927.

Industrial Board has no jurisdiction to review an applicant for compensation on the ground of change in condition of the injured applicant where in fact there was no change in position and the ground for review as given was that the original award was erroneous.

12809 JORDAN v. MIDLAND ACCEPTANCE CORP. Marion County. *Affirmed.* Remy, J. April 26, 1927.

Affirmed on authority of *Marshall v. Marshall* (1920) 74 Ind. App. 204, 128 N. E. 299.

12828 KLAMT v. TERRE HAUTE BREWING CO. Industrial Board. *Affirmed. Per Curiam.* April 29, 1927.

Per Curiam.

12700 MCGORAN v. CROMWELL, ET AL. Vigo County. *Reversed.* Thompson, J. April 27, 1927.

Where a member of a family is not driving the family automobile on the business of the head of the family who is the owner of the car, then no agency relation is involved and the owner is not liable for the negligent conduct of the driver. The so-called "family automobile doctrine" does not apply in Indiana.

12840 MASUR v. FREYN. Marion County. *Affirmed.* Enloe, J. April 20, 1927.

In an action in trover, the complainant has the burden of establishing the ownership of the property as well as proving conversion by the defendant.

12635 NORTHERN INDIANA FUEL & LIGHT CO. v. ELDRIDGE. DeKalb County. *Affirmed.* April 7, 1927.

Where defendant is negligent in leaving gas pipes along the side walk, this is sufficient proof of negligence for complainant to recover even though an intervening agency caused the pipe to fall on the side walk and thus be the cause of the complainant's injury.

12826 RICHARD v. THE UNIQUE ILLUSTRATING CO. Sullivan County. *Affirmed.* Thompson, J. April 5, 1927.

It is error to admit in evidence a post card sent by post master giving notice of the refusal of merchandise where such evidence is not connected with the liability of the defendant.

12613 ROSENBERG, ET AL. v. AMERICAN TRUST & SAVINGS BANK OF WHITING, INDIANA, ET AL. Lake County. *Affirmed.* Nichols, J. April 29, 1927.

A court order for alimony does not constitute a lien upon land owned by the divorced husband.

12786 ROWLETT v. COCKRILL. Delaware County. *Affirmed.* McMahan, C. J. April 22, 1927.

Where a complaint is not made by demurrer, the case is not subject to reversal on appeal where defects in the complaint were remedied by evidence admitted in the trial.

12575-12624 SECURITY LIFE INSURANCE CO. OF AMERICA v. GOTTMAN. Vanderburgh County. *Affirmed.* McMahan, C. J. April 20, 1927.

Where an insured fails to pay the agreed interest on a bond and the insurer corresponds with him in regard to extra interest but does not refer to terminating the policy if the additional amount is not paid, the insurer may not terminate the policy without giving notice to the insured.

12673 SIMPSON v. SHERWIN-WILLIAMS CO., ET AL. Miami County. *Affirmed.* April 6, 1927.

An exception to an instruction by endorsement on the margin of the contract itself, although signed by the trial judge, is not a sufficient compliance with the statute unless it is dated. (Burns' 1926, sec. 385.)

12565 SLUSS v. THERMOID RUBBER CO. Boone County. *Affirmed. Per Curiam.* April 8, 1927.

Per Curiam.

12864 STATE OF INDIANA CONSERVATION DEPT. v. NATTKEMPER. Industrial Board. *Reversed.* Thompson, J. April 21, 1927.

A game warden is an officer of the state and not an employee of the Fish and Game Commission so far as recovery goes under the Workmen's Compensation Act.

12847 THORSTON v. CARTER. Johnson County. *Affirmed.* McMahan, C. J. April 8, 1927.

Where one is liable under a contract to make repairs on a ditch, the damages that are recoverable for breach of this provision may cover not only the cost of the repairs but reasonable damages caused by failure to make the repairs according to the contract.

12549 THE TRI STATE LOAN & TRUST COMPANY, EXECUTOR, ETC. v. BELL, ET AL. Allen County. *Appeal dismissed.* Nichols, J., April 22, 1927.

A judgment in favor of those who were parties to the action will be sustained on appeal, since it is only those who can be injured by being omitted that can raise an objection.

12761 WESTERN OIL REFINING CO. v. GLENDENNING. Clinton County. *Reversed.* Nichols, J. April 22, 1927.

There can be no recovery from a principal in a case of malicious prosecution unless it is established that the agent who started the prosecution was acting with the authority of his principal in so doing.

12540 WOLF HOTEL COMPANY v. PARKER. St. Joseph County. *Affirmed.* McMahan, C. J. April 27, 1927.

A landlord may be liable for damage to goods in tenant's trunk if the damage is caused by water entering basement which the landlord in the exercise of his duties of reasonable care could have prevented.